ONG YOKE ENG & ANOR.

v.

LIM AH YEW & ORS.

HIGH COURT MALAYA, PENANG
MOHD. DZAIDDIN J
[CIVIL SUIT NO. 424 OF 1974]
17 FEBRUARY 1986

DAMAGES: *Quantum - Fatal accident - Liability admitted by defendants - Special damages agreed - Claim for loss of dependency under s. 7 of Civil Law Act 1956 - Evidence as to whether there was loss of income - Claim for lost years under s. 8(2)(1) of the Act - Loss of future earnings - Whether deceased's estate had lost income - Claim for loss of expectation of life - Interest on special damages.*

As a result of a collision between a lorry and a motorcar in 1973, the deceased, who was travelling as a passenger in the motorcar, sustained severe injuries which resulted in his death. The lorry was driven by the 1st defendant as a servant or agent for the 2nd defendant. When the case finally came up for hearing on 18 December 1985, the defendants admitted full liability and special damages were agreed at RM2,000. The only issue here was on general damages where the widow was claiming against the defendants (a) damages for loss of dependency under s. 7 of the Civil Law Act 1956 (the Act) and (b) damages for the benefit of the husband's estate (the "lost years") under s. 8(2)(c) of the Act.

Held:

[1] Loss of Dependency under s. 7 of the Act

(a) The method of calculating dependency claim on death is not a problem (see *Cookson v. Knowles* [1978] 2 All ER 604).

(b) Such a loss must be calculated from date of death and the estimate of the net loss of contribution by the deceased to the family is simply a question of fact based on the evidence before the Court.

(c) After having heard the evidence of PW1 (the wife of the deceased) the Judge held that her evidence in Court was contrary to and a fundamental departure from her averments in para. 6 and 7 of the statement of claim.

(d) From the available evidence, there was no loss of income to the widow and her children which would enable the calculation or ascertainment of the pre-trial loss as well as post-trial loss.

(e) In the circumstances above and also taking into account the fact that the widow and children as dependants have not suffered any loss upon the death of the deceased, no award for loss of dependency was made.

[2] Damages for Lost Years under s. 8(2)(c) of the Act

(a) Section 8 of the Act is a claim for the benefit of the deceased's estate that if he had not died, he would have had a cause of action to recover damages for loss of future earnings. However, as he had died, this cause of action survived for the benefit of his estate and in this action the plaintiffs should be entitled to recover damages for loss of future earnings (see Suffian LP in *Yap Ami & Anor. v. Tan Hui Pang* [1982] CLJ (Rep) 367).

(b) Taking the facts and evidence into account the deceased's estate has lost nothing to entitle them to damages for loss of future earnings. In fact, the income from the family business continued to increase after his death.

[3] The only claim available to the estate will be for loss of expectation of life, the conventional sum being RM4,000, RM2,000 as agreed special damages and interest will be awarded on special damages under the principles of *Jefford v. Gee* [1970] QB 130.

[Award accordingly.]

Cases referred to:
Cookson v. Knowles [1978] 2 All ER 604
Yap Ami & Anor. v. Tan Hui Pang [1982] CLJ (Rep) 367
Gammell v. Wilson [1982] AC 27
Jefford v. Gee [1970] QB 130

Legislation referred to:
Civil Law Act 1956, ss. 7, 8, 8(2)(c)
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 1(2)(c)

[**Editor's Note:** Plaintiffs are appealing against this decision]

JUDGMENT

Mohd. Dzaiddin J:

On 14 May 1973 Chuan Im Tit @ Chuan Joo Ting deceased, was travelling as a passenger in motorcar No. PM 815 from Bukit Mertajam towards Butterworth when at about 10.30 p.m. at or near 3½ milestone Jalan Baru, Prai, his motorcar was involved in a collision with motor-lorry No. KB 1875 travelling in the opposite direction. The lorry was driven by the 1st defendant as a servant or agent of the 2nd defendant. As a result of the said collision, the deceased sustained severe injuries which resulted in his death.

At the time of death, the deceased was 37 years of age and was survived by his widow, Ong Yoke Eng, and six children, the eldest being 15½ years old and the youngest 9½ years old. However, at the date of the trial all the children have reached the age of 21 years and except for two children the rest have married and are working elsewhere.

Unfortunately, this case had a rough passage before it finally came up for hearing on 18 December 1985. However, the defendants had admitted full liability and special damages were agreed at RM2,000. The only issue is on general damages where the widow is claiming against the defendants (1) damages for loss of dependency under s. 7 of the Civil Law Act 1956 and (2) damages for the benefit of the husband's estate (the "lost years") under s. 8(2)(c) of the same Act.

Loss of Dependency

The method of calculating dependency claim on death should pose no problem (see: *Cookson v. Knowles* [1978] 2 All ER 604), but such a loss must be calculated from date of death and the estimate of the net loss of contribution by the deceased to the family is simply a question of fact based on the evidence before this Court. In the present case, I shall proceed to consider and evaluate the plaintiff's evidence and make a finding of fact.

It is not disputed that the deceased was 37 years old at the time of the accident and was survived by a widow aged 34 years old and 6 children, the eldest being 15½ years old and the youngest 9½ years old. On the day of the trial, the widow was 45 years of age and the 6 children had all reached or passed the age of majority. According to the widow, PW1, the deceased during his life time carried on business as a coffee shop proprietor at No. 76 Love Lane, Penang. He used to give her RM300 per month for the family expenses. She used RM150 for marketing, and the balance was utilised as pocket money for her children. The deceased also gave her RM160 a year during festive season. She assisted him in the running of the coffee shop on part-time basis. Upon his death, she took over the business and for a while she engaged as assistant, PW2 and paid him RM5 per day including food for 6 days in a week. Ong Phong Tong Huat, PW2 testified for the plaintiffs and confirmed that he worked with PW1 from October 1976 until May 1980 and was paid RM5 a day inclusive food.

Under cross-examination, PW1 stated that the deceased operated the coffee shop since 1969. She agreed that she helped her husband full-time. Her eldest daughter also assisted the deceased. After his death, she took over the business and registered the shop in her name. It continued to be a family business where she derived the income from the shop. Two of her sons and a daughter assisted her in the running of the coffee shop. Since 1973, the income from the coffee shop had increased.

She stated that at present her daily profit was between RM20 and RM30.

Having heard the evidence of PW1, it is my finding that during the life time of the husband, she worked full-time helping the husband in the coffee shop. The business has been a family concern where according to her upon the husband's death she registered or paid the licence in her name and some of his children continued to assist her in the shop. Since 1973 the income from the shop had increased and the net profit in 1985 was between RM20 to RM30 per day. It is clear that the income has continued to increase despite the husband's death. How can it be said that the widow and children had lost RM366 per month from his support as a result of the deceased's untimely death? I find her evidence in Court is contrary to and a fundamental departure from her averments in para. 6 and 7 of the statement of claim. From the above evidence, I find there is no loss of income to the widow and her children which will enable me to calculate or ascertain the rate of dependency at death (pre-trial loss) as well as at the date of the trial (post-trial loss).

In the circumstances I make no award for loss of dependency because, as I have stated above the widow and children as dependents had suffered no loss upon the death of the deceased. In fact according to PW1 since 1973 the income from the coffee shop has continued to increase and in December 1985 the net profit was between RM20 and RM30 per day.

Damages for Lost Years

Under this heading the claim is made on behalf of the deceased's estate under s. 8(2)(c) of the Act. The law under this claim is clearly explained by Suffian LP in *Yap Ami & Anor. v. Tan Hui Pang* [1982] CLJ (Rep) 367 following the decision of the House of Lords in *Gammell v. Wilson* [1982] AC 27. To summarise, s. 8 of the Act is a claim for the benefit of the deceased's estate, that if he had not died he would have had a cause of action to recover damages for loss of future earning. However, as he had died this cause of action survived for the benefit of his estate and in this action the plaintiffs should be entitled to recover damages for loss of future earnings.

> The loss to a deceased's estate which s. 1(2)(c) of the (Law Reform (Miscellaneous Provisions) Act says may not be recovered is not any loss, but loss to his estate consequent to his death. Loss of future earnings is not a consequent of the death and it may therefore be recovered.

per Suffian LP at p. 318 H to I.

Here, I would apply the same reasoning put forward by Suffian LP in *Yap Ami*. As earlier stated, the deceased was in his life time self-employed in the running of the family coffee shop. He was assisted full-time by the widow and his eldest daughter. The income from the coffee shop was used to maintain himself and the family. After his death, the coffee shop business continued to be run or operated by the wife with the help of some of her children. The income continued to increase after his death. If the deceased had survived and not died, would there by any difference in his income? The answer was given by the widow, PW1, in her evidence where she stated that as the business was a going concern and despite the death of her husband the net profit in December 1985 was between RM20 to RM30 per day and since 1973 the income continued to increase. On the above basis it is my finding that the deceased's estate has lost nothing to entitle them to damages for loss of future earnings.

In my judgment, the only claim available to the estate will be for loss of expectation of life, the conventional sum being RM4,000. In the circumstances I award the plaintiffs RM4,000 for loss of expectation of life, RM2,000 as agreed special damages and costs to be taxed by the proper officer of the Court. I disallow any claim for loss of dependency. Of course there will be the appropriate award by way of interest on special damages under the principles of *Jefford v. Gee* [1970] QB 130.

Also found at [1986] 1 CLJ 509